

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2004-085458-001 DT

03/29/2006

HONORABLE DAVID R. COLE

CLERK OF THE COURT
I. Huerta
Deputy

FILED:_____

STATE OF ARIZONA

ANDREA L KEVER

v.

MICHAEL M BROOKE (001)

BRIAN DOUGLAS SLOAN

MCDOWELL MOUNTAIN JUSTICE
COURT
REMAND DESK-LCA-CCC

RECORD APPEALRULE/REMAND

The Court has had occasion to review the appellate memoranda and listen to the audio recording of the proceedings in the companion case to which counsel directed the Court's attention.ⁱ

Appellant urges that the trial court erred in denying his motion to suppress any and all evidence obtained as a result of the vehicle stop. The premise for appellant's argument is that it was not "practicable" for him to turn into "the left lane immediately available" for his direction of traffic. (*See* A.R.S. §28-751(2).) Appellee urges that the trial court correctly denied the motion to suppress and that there are no grounds for reversal. Appellee correctly recites the law as it relates to the standard of review on appeal.

Although the Court does not take issue with the general principles set forth in appellant's memorandum, it does not agree with appellant's application of the case law to the present matter. Appellant places substantial reliance upon *State v. Livingston*, 206 Ariz. 145, 75 P.3d 1103 (App. 2003), in which the court of appeals upheld an order suppressing evidence obtained as a result of a traffic stop conducted after an officer observed a vehicle cross the white shoulder line on Highway 77. Appellant urges that *Livingston* militates in favor of an order vacating the order denying his motion to suppress. Appellee has not attempted to refute appellant's claim or distinguish *Livingston*.

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At first blush, appellant's argument has some persuasive appeal. Although this case and *Livingston* involve different statutes, both couch the driver's responsibility in terms of what is "practicable."ⁱⁱ To that extent, neither statute creates the kind of "bright line" that inheres in many traffic-related statutes. In *Livingston*, the judge granted the motion to suppress because he found that the driver's errant operation of the vehicle was, at most, "momentary" and "not so egregious as to constitute a violation of the statute." 206 Ariz. at 147, 75 P.3d at 1105. Furthermore, he concluded that the officer had a "secondary" motivation in determining that the "momentary" crossing of the line constituted a violation, i.e., to "gain the opportunity to observe the vehicle's occupant more intently. *Id.*

Although appellant accurately sets forth the *Livingston* court's comments concerning the legislative intent behind A.R.S. §28-729, i.e., "to avoid penalizing brief, momentary, and minor deviations outside the marked lines" (*Id.* at 148), the present case involves a different statute. Given the different kinds of conduct addressed by these statutes, one cannot simply superimpose the *Livingston* court's rationale or its assessment of legislative intent upon §28-751(2) and reach a defensible result. It would have been unreasonable to expect the officer in this case to wait and see how many more left turns appellant might make before pulling him over.ⁱⁱⁱ Given the circumstances in *Livingston*, the judge was justified in ruling that, in effect, there had been no violation of the "single lane" statute. The judge did not make such a finding here and, in any event, would not have been justified in doing so. The Court concludes that *Livingston* does not govern here.

In presenting argument in the companion case, counsel for appellant focused upon the "subjective" nature of the conduct addressed by A.R.S. §28-751(2) and how a driver does not violate the statute if, for example, he intends to make a right turn soon after making the left turn in question. An officer's decision whether to cite a driver for a violation of this statute might hinge on any number of factors, including any statement the driver might make as to why, under the circumstances, it would not have been practicable to turn into the first available lane. However, it is a different thing altogether to conclude that an officer cannot stop a vehicle based on his observations and "objective" determination that the driver may have violated the law. The Court does not find appellant's "mistake of law" analogy persuasive in this context.

For the reasons set forth above, and the Court having concluded that appellant has not demonstrated that the court below abused its discretion when it denied the Motion to Suppress,

IT IS ORDERED affirming the order denying appellant's Motion to Suppress.

IT IS FURTHER ORDERED returning this matter to the McDowell Mountain Justice Court for such further proceedings as may be appropriate.

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ⁱ *State v. Schacki*, McDowell Mountain Justice Court Cause No. TR2005-00069

ⁱⁱ As stated above, the statute at issue in the present case is A.R.S. §28-751(2); the statute at issue in *Livingston* was A.R.S. §28-729(1).

ⁱⁱⁱ Not only would this expectation be unreasonable, but such conduct would in all likelihood constitute dereliction of duty on the part of the officer.